84-20

No.________________

In the Supreme Court of the United States

October Term, 1983

RICHARD W. DYKE, dba Western Stations Co.,
COLVIN OIL COMPANY, and
F. O. FLETCHER, INC., dba Fletcher Oil Company,
Petitioners,

vs.

GULF OIL CORPORATION,
Respondent.

Petition for a Writ of Certiorari
To the Temporary Emergency
Court of Appeals of the United States

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28 pp

QUESTIONS PRESENTED

I

Whether the Emergency Petroleum Allocation Act of 1973 gives the trial court discretion to award reasonable attorney's fees to prevailing plaintiffs who have established their right to recover overcharges although they have not established a right to treble damages?

II

Whether, under the mutuality doctrine of *Illinois Brick*, it is proper to deny standing to a plaintiff who was damaged by purchasing defendant's product through a third party under a preexisting cost-plus contract when the statute has been construed to allow defendants to avoid liability to direct purchasers who resold under such contracts on the ground that they suffered no damage?

III

Whether the appeals court contravened established principles of judicial review by interpreting the State of Oregon's choice of law on applicable limitations periods in a manner contrary to the interpretation of the highest court of the State of Oregon?

LIST OF PARTIES AFFECTED

The caption of the case in this Court contains the names of all parties involved in this appeal, except for the following amici curiae who addressed the first question presented:

Independent Oil and Tire Co.
Shepherd Brothers Service Stations
U. S. Oil Company, Inc.

The United States of America was an Intervenor solely on a constitutional issue not raised in this petition.

Petitioners have no parent corporations, subsidiaries and affiliates.

TABLE OF CONTENTS

TABLE OF AUTHORITIES CITED

Page

Cases

TABLE OF AUTHORITIES (Cont.)

Page

STATUTES

STATUTES (Contd.)

CONGRESSIONAL MATERIALS

No. ____________

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Petitioners respectfully petition for a writ of certiorari to the Temporary Emergency Court of Appeals of the United States.

REPORTS

The opinion of the three judge panel of the Temporary Emergency Court of Appeals is not yet officially reported. It is unofficially reported at 4 Energy

Mgmt. (CCH) ¶ 26,485. The slip opinion including concurring and dissenting opinions is included in the appendix. A. 1. The District Court's June 20, 1983 Findings of Fact and Conclusions of Law, which was reversed in part, has not been reported. It is included in the appendix. A. 89. The opinion of the District Court on attorney's fees, which was reversed in part, is officially reported at 571 F. Supp. 780 (D. Or. 1983). It has been included in the appendix. A. 127. The March 8, 1982 opinion of the District Court on statutes of limitations, which was reversed in part, has not been reported. It is included in the appendix. A. 147.

JURISDICTION

Following oral argument on March 19, 1984, the Temporary Emergency Court of Appeals rendered and entered its decision on April 17, 1984. The dissenting and concurring opinions were filed on April 27, 1984. Plaintiffs' timely petition for rehearing and suggestion for rehearing *en banc* was denied on May 29, 1984. A. 87. Defendant's timely petition for rehearing was denied on June 4, 1984. A. 85.

This Court has jurisdiction pursuant to Section 211(g) of the Economic Stabilization Act (12 U.S.C. § 1904 note), as amended, and as incorporated into the Emergency Petroleum Allocation Act of 1973, Section 5(a), 15 U.S.C. § 754(a). Section 211(g) provides:

"Within 30 days after entry of any judgment or order by the Temporary Emergency Court of Appeals, a petition for writ of certiorari may be filed in the Supreme Court of the United States."

STATUTORY PROVISIONS INVOLVED

This case was brought pursuant to Section 210 of the Economic Stabilization Act ("ESA"), as amended, Pub. L. No. 92-210, 85 Stat. 843 (1971), 12 U.S.C. § 1904 note:

"§ 210. *Suits for damages or other relief*

"(a) Any person suffering legal wrong because of any act or practice arising out of this title, or any order or regulation issued pursuant thereto, may bring an action in a district court of the United States, without regard to the amount in controversy, for appropriate relief, including an action for a declaratory judgment, writ of injunction (subject to the limitations in Section 211, and/or damages.

"(b) In any action brought under subsection (a) against any person renting property or selling goods or services who is found to have overcharged the plaintiff, the court may, in its discretion, award the plaintiff reasonable attorney's fees and costs, plus whichever of the following sums is greater:

> "(1) an amount not more than three times the amount of the overcharge upon which the action is based, or
>
> "(2) not less than $100 or more than $1,000;

"except that in any case where the defendant establishes that the overcharge was not intentional and

resulted from a bona fide error notwithstanding the maintenance of procedures reasonably adapted to the avoidance of such error the liability of the defendant shall be limited to the amount of the overcharge: *Provided,* That where the overcharge is not willful within the meaning of Section 208(a) of this title, no action for an overcharge may be brought by or on behalf of any person unless such person has first presented to the seller or renter a bona fide claim for refund of the overcharge and has not received repayment of such overcharge within ninety days from the date of the presentation of such claim.

"(c) For the purpose of this section, the term 'overcharge' means the amount by which the consideration for the rental of property or the sale of goods or services exceeds the applicable ceiling under regulations or orders issued under this title."

Section 210 of the ESA was incorporated into the Emergency Petroleum Allocation Act of 1973 ("EPAA)", Pub. L. No. 93-159, 87 Stat. 627, 15 U.S.C. § 751, *et seq.,* by Section 5(a) of the Act which provides in part:

". . . [S]ection 205 through 211 of the Economic Stabilization Act of 1970 (as in effect on the date of enactment of this Act) shall apply to the regulation promulgated under Section 4(a), to any order under this Act, and to any action taken by the President (or his delegate) under this Act, as if such regulation had been promulgated, such order had been issued, or such action had been taken under the Economic Stabilization Act of 1970 . . ."

The Oregon statute of limitations the District

Court held applicable to Fletcher is Or. Rev. Stat. § 12.080(2) which provides:

> "12.080 *Action on certain contracts or liabilities.* . . .
>
> "(2) An action upon a liability created by statute, other than a penalty or forfeiture, excepting those mentioned in ORS 12.110;"
>
> ". . . . .
>
> "shall be commenced within six years."

The Washington statute held applicable by the appeals court is Wash. Rev. Stat. § 4.16.130[1] which provides:

> "*Actions for relief not otherwise provided for.* An action for relief not hereinbefore provided for, shall be commenced within two years after the cause of action shall have accrued."

STATEMENT OF THE CASE

The jurisdiction of the district court was invoked under Section 211(a) of the Economic Stabilization Act, 12 U.S.C. § 1904 note, as incorporated into the Emergency Petroleum Allocation Act, 15 U.S.C. § 754(a). Section 211(b)(2) vests exclusive appellate jurisdiction over all such controversies in the Temporary Emergency Court of Appeals (TECA).

On January 1, 1974 Gulf changed plaintiffs and

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[1] The appeals court actually cited Wash. Rev. Stat. § 12.16.-130, but that citation is apparently an error. A. 43.

all of its other Gulf branded jobbers in its San Francisco Retail Marketing District from branded to unbranded status. Gulf continued to supply them with gasoline but they could no longer operate under Gulf's brand, accept Gulf credit cards, or have other amenities of the brand. A. 94.

Because of their changed status, the newly unbranded jobbers were to receive new prices from Gulf, according to the EPAA and the regulations thereunder. Most of the reclassified jobbers received prices based on those Gulf had been charging an existing unbranded jobber. For plaintiffs, though, Gulf created new prices it derived from an oil journal publishing spot purchase prices. A. 103-104, 115. Gulf claimed at the time that the "new item-new market" rule justified the use of two different methods to set prices for these jobbers.

As a result of the change, the other jobbers' prices went down approximately one to two cents a gallon. A. 98, 102. Plaintiffs' prices went *up* approximately two to three cents a gallon, in spite of their loss of branded services. A. 97, 100, 103. Plaintiffs claimed Gulf had violated the petroleum pricing regulations.

Plaintiffs sent 90-day demand letters to Gulf for the overcharges as required by § 210, but Gulf did not respond. A. 105. In 1977 plaintiffs filed actions for overcharges from 1974 to 1977. The cases were consolidated for trial. At trial, Gulf admitted that its use of the new item-new market rule was unjustified. A. 104.

On September 12, 1983 the trial court entered judgment awarding overcharges of $2,000,000 to Dyke, $790,000 to Fletcher and $745,000 to Colvin. Plaintiffs also received prejudgment interest of $557,588.38, $408,471.69 and $200,568.99 and attorney's fees of $385,500, $191,000 and $173,500, respectively. A. 5.

Gulf appealed to the Temporary Emergency Court of Appeals, which in part reversed the District Court. The appeals court eliminated Fletcher's award on standing and statute of limitations grounds and reversed the award of prejudgment interest and attorney's fees. It remanded the case to the district court for consideration of additional evidence Gulf had proffered as to what existing prices were appropriate for plaintiffs. A. 54.

The appeals court subsequently denied both parties' timely petitions for rehearing and plaintiffs' suggestion for rehearing *en banc*. A. 85, 87.

REASONS FOR GRANTING THE WRIT

I

The Trial Court must have the discretionary power to award attorney's fees to a prevailing plaintiff under the EPAA in order to carry out the congressional intent of a remedial statute and a private enforcement mechanism

Reversing the District Court's discretionary award of attorney's fees to the prevailing plaintiffs, the panel majority held that no such discretion existed because

Gulf's overcharges were unintentional, bona fide error[2] and in spite of reasonable procedures to avoid overcharges. A. 38.

The ruling is contrary to the language and structure of § 210(b) of the ESA and the intent of Congress to provide a remedial statute and private enforcement mechanism in § 210.

Section § 210(b), quoted at pages 3-4, *supra,* provides that in any action brought under subsection (a) the court may award attorney's fees to the plaintiff. The "bona fide error" exception, limiting liability to the amount of the overcharge, does not apply to attorney's fee awards but only to the additional provision for treble damages or an amount between $100 and $1,000, if greater.

The appeals court rejected this interpretation, holding that attorney's fees and costs may not be awarded unless treble damages are authorized as well.

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[2] This ruling ignored the trial court's refusal to find bona fide error by Gulf. The panel majority made a de novo finding "upon examination of the record" that any overcharges were the result of bona fide error. A. 38. Gulf requested a finding of good faith error; plaintiffs opposed the finding and the trial court refused to make it. It was Gulf's burden to prove bona fide error since plaintiffs sent 90-day demand letters in accordance with § 210. Gulf did not even appeal the District Court's refusal to find bona fide error; it contended on appeal only that a finding of unintentional conduct was sufficient alone to remove the District Court's discretion. A. 4. Since the trial court specifically refused to make a finding of good faith error, an award of attorney's fees is appropriate on the record even based on the three-part test applied by the appeals court.

Such an interpretation of the statute is not only contrary to the language and structure of § 210, but it also runs counter to the goal of § 210 to provide for remedial recovery of overcharges. The Temporary Emergency Court of Appeals has described § 210 as providing "compensatory relief" and "remedial recovery." *Ashland Oil Co.* v. *Union Oil Co.*, 567 F.2d 984, 990 n. 12 (TECA 1980). The award of overcharges is hardly compensatory when seven years of attorney's fees, made necessary by defendant's "aggressive and persistent" defense (A. 138), are subtracted.

Based on the legislative history of the EPAA, the appeals court has also recognized the critical private enforcement mechanism Congress expected § 210 to provide. *Ashland*, 567 F.2d at 990 n. 11. The District Court accordingly explained its award of attorney's fees:

> "Obviously, the statute is remedial in nature. It does create a private right of action for damages. *Where a bona fide claim is made and rejected, the only choice that a plaintiff has is to seek recourse by suit.* And if attorneys' fees are not allowed under those circumstances, that certainly tends to discourage enforcement of — private enforcement, which Congress has determined is necessary." [Emphasis added.] (Vol. 25, Tab 329, pp. 1166-67)

In passing emergency legislation to deal with a national crisis, Congress recognized that the government's resources would be inadequate for proper en-

forcement. H. R. Rep. No. 93-531, 93d Cong., 1st Sess., *reprinted in* 1973 U.S. Code Cong. & Ad. News 2582, 2583. The majority opinion, however, has construed the governing statute to deny not only the recovery of reasonable attorney's fees, but also the necessary costs of the litigation itself. The factors of a defendant's intentional conduct, bona fide error and reasonable procedures are relevant only to the 'punitive' treble damages.

The panel majority fails to address the facts that plaintiffs submitted 90-day demand letters to Gulf, that Gulf finally acknowledged it had improperly created a new class of purchaser and that plaintiffs had to take Gulf to court to recover the overcharges.[3]

Congress intended § 210 as a compensatory statute and as encouragement to private enforcement of the EPAA and ESA. The decision in this case undercuts that intent by denying to prevailing plaintiffs the right to recover attorney's fees and costs, even when the trial court believes that is warranted. The error should be corrected and the trial court's decision that an award

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[3] Plaintiffs have also twice briefed and argued before the appeals court issues going to the heart of enforcement of the statutes and regulations. In *Dyke* v. *Gulf Oil Corp.*, 601 F.2d 557 (TECA 1979), Gulf did not prevail in its attempt to make the DOE a party in all private enforcement actions. In this appeal, Gulf sought to establish that the EPAA and the ESA are unconstitutional. The appeals court in its opinion utilizes arguments raised by plaintiffs on "report and wait" and severability in rejecting Gulf's position. A. 19 n. 24, 27-28.

of attorney's fees was appropriate should be given effect.[4]

II

The decision below violates the mutuality doctrine of ILLINOIS BRICK by rejecting the offensive use of pass-on though it had approved the defensive use of pass-on

Under contracts in existence at the time of the change to unbranded status, Gulf sold gasoline to Tesoro Petroleum Corporation which then resold it to Fletcher for Gulf's sale price plus a fixed markup of $.00375 per gallon. Prior to execution of both the Gulf-Tesoro and the Tesoro-Fletcher contracts, Gulf knew that Fletcher would be the party receiving and retailing the gasoline.[5]

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[4] The panel majority's reference to an abuse of discretion on the *amount awarded* by the trial court is based on an another incorrect reading of the record. A. 39 n. 38. The panel majority's reference to amounts over $499,531.36 as being a bonus is incorrect, as that figure was sought for Dyke alone. Fletcher and Colvin also had fees. Plaintiffs did request a bonus, but the District Court denied it and substantially reduced the requested hourly rates. *Dyke* v. *Gulf Oil Corp.*, 571 F. Supp. 780, 783-86 (D. Or. 1983). A. 138-146. Dyke received $385,500, Fletcher received $191,000 and Colvin received $173,500. Gulf did not even appeal whether the hours and hourly rates for Oregon set by the District Court were reasonable. Attorney's fees on appeal are also appropriate.

[5] Gulf representatives investigated Fletcher's station locations and explained the ramifications of Fletcher's anticipated use of the Gulf brand. As part of the transaction, Gulf established a special procedure for Fletcher to transmit its Gulf credit card sales invoices directly to Gulf, for which Gulf allowed Tesoro credit on Tesoro's open account. Notices of

Although the appeals court recognized that a pass-on *defense* may be asserted where there is, as here, a preexisting functional equivalent of a cost-plus contract (A. 47-50), it nevertheless held that Fletcher had no standing to sue because it did not purchase directly from Gulf. A. 40-42.

The incongruous result is that if Tesoro had sued Gulf, Gulf could have successfully raised the pass-on defense because Tesoro, due to its preexisting cost-plus contract with Fletcher, would have suffered no damage. Yet, under the panel majority's holding, Fletcher, the party which did suffer the damage, cannot sue because it is an indirect purchaser. The panel majority's analysis is contrary to decisions of this Court and the Fifth Circuit and is fundamentally unfair.

A basic principle underlying the defensive or offensive use of the pass-on theory is mutuality; you cannot have one without the other. In *Illinois Brick Co. v. Illinois*, 431 U.S. 720, 97 S. Ct. 2061, 52 L. Ed. 2d 707 (1977), this Court held that if a pass-on theory may not be used defensively by a violator against a direct purchaser, then that theory may not be used

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price changes came directly from Gulf to Fletcher, not through Tesoro. Fletcher took delivery of product directly from terminals in Oregon and Washington designated by Gulf, not Tesoro. Gulf included Fletcher in meetings held with all of Gulf's branded jobbers. When Gulf applied to the Department of Energy to withdraw as a supplier from certain West Coast locations, Fletcher received a copy of Gulf's application in which Gulf's Legal Department requested the DOE to terminate its supply obligation to "Tesoro Fletcher." A. 111.

offensively by an indirect purchaser against the violator. 431 U.S. at 735; 97 S. Ct. at 2069. *See In re Beef Industry Antitrust Litigation*, 600 F.2d 1148, 1164 n. 20 (5th Cir. 1979), 449 U.S. 905, 101 S. Ct. 281, 66 L.E..2d 137 (1980). The Temporary Emergency Court of Appeals recognized the defensive use of the pass-on theory in *Eastern Air Lines, Inc.* v. *Atlantic Richfield*, 609 F.2d 497 (TECA 1979). It followed this Court's rulings in *Hanover Shoe, Inc.* v. *United Shoe Machinery Corp.*, 392 U.S. 481, 88 S. Ct. 2224, 20 L. Ed. 2d 1231 (1968), and *Illinois Brick, supra.* The court also found support for its analysis in the *In re Beef Industry* case, *supra*, which involved the offensive use of the pass-on theory. It adopted the principles of those antitrust cases for actions under the EPAA. 609 F.2d at 498-499.

The case at bar is apparently the first case before the appeals court to present an issue of offensive use of the pass-on theory. Unfortunately, the panel majority totally ignored the rulings of the Supreme Court and the Fifth Circuit relied on by another panel in *Eastern.* Rather than applying the pass-on concepts developed in *Hanover, Illinois Brick* and *In re Beef Industry,* the panel majority held that because the EPAA expired in 1981 and it was exercising its jurisdiction under a savings clause, it would not "expand the statutes" to allow recovery by indirect purchasers. A. 42.

Recognizing the offensive use of pass-on in cases of preexisting cost-plus contracts does not "expand"

the statute. It allows the party who was overcharged to recover from the violator and prevents the violator from escaping justice. If "expansion" of the statute is involved at all, it was expanded in 1979 with recognition of defensive pass-on. Offensive pass-on is merely its necessary corollary. No principle of law denies a plaintiff equal treatment under the law or renders decisions of the Supreme Court inapplicable merely because an appellate court is considering a case under a savings clause.[6]

III

The decision below contravenes established principles of judicial review by interpreting the State of Oregon's choice of law on applicable limitations periods in a manner contrary to the interpretation of the highest court of the State of Oregon

On appeal Gulf did not challenge the trial court's analysis of Oregon choice of law. A. 14. In deciding an issue not raised on appeal, the appeals court analyzed Oregon choice of law contrary to the decisions of the Oregon Supreme Court, the highest court of the

[6] Fletcher brought its action against Gulf in October 1977. Had it not been for an interlocutory appeal, *Dyke* v. *Gulf Oil Corp.*, 601 F.2d 557 (TECA 1979), and other delays that occur in a complex suit against a large corporate defendant, the case could have been resolved before expiration of the EPAA. The District Court found that plaintiffs' attorneys "worked efficiently and expeditiously and in a timely and cooperative manner." 571 F. Supp. 780, 786 (D. Or. 1983).

State of Oregon. Its opinion does not even mention the Oregon Supreme Court cases on the issue.

As a preliminary matter, it should be noted that the appeals court based its decision on incorrect facts. The three "facts" the appeals court relied upon in utilizing the Washington statute of limitations are that Fletcher is a Washington resident, most of its gasoline was purchased in Washington and all of the gasoline was sold there. A. 45.

The statement that all of Fletcher's gasoline was sold in Washington is 12,000,000 gallons incorrect. Fletcher sold Gulf gasoline to stations in Oregon, in Portland, Hubbard, Canby, The Dalles, Haines, La-Grande, Pendleton and Umatilla during the overcharge period.

Fletcher purchased more gasoline in Oregon than in Washington in 1974[7] and approximately 40% of its gasoline in Oregon during the entire overcharge period. Gasoline purchased in Washington was sometimes taken to Oregon to be sold.

Finally, Fletcher is not a Washington resident. Fletcher is an Idaho corporation, a fact admitted by

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[7] The limitations period ran from the first overcharge in January 1974. A. 47. Oregon clearly had the most significant relationship at that time, according to the appeals court criteria. Just because later the preponderance of purchases shifted to Washington does not mean the limitations period should shift, particularly when Washington has only a two-year statute.

Gulf in its answer to the complaint. The place of incorporation determines residency. *Vandevoir* v. *Southeastern Greyhound Lines,* 152 F.2d 150, 152 (7th Cir. 1945).

These gross errors, however, are basically irrelevant to the Oregon Supreme Court's choice of law analysis. Before examining the parties' contacts in each state, it is necessary under Oregon law first to determine whether there is a conflict with the interests and policies of another state. Unless there is such a conflict, the law of the forum applies. *Tower* v. *Schwabe,* 284 Or. 105, 585 P.2d 662, 663 (1978); *Erwin* v. *Thomas,* 264 Or. 454, 506 P.2d 494, 496 (1973).

Oregon's choice of law process on limitations periods addresses two questions: (1) is a conflict with the interest and policies of another state involved and, if so, (2) which state has the most significant relationship?[8] The opinion of the appeals court is unclear. The court either ignored the first step entirely or applied the "most significant relationship" test twice. A. 45.

The interests and policies of the State of Washington are not involved here. The *defendant* Gulf is not a Washington resident and Washington courts are not involved. Those are the state interests a court examines when choosing a *limitations period* (A. 158-159), since the function of limitations periods is to protect a state's

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[8] The Ninth Circuit has also recognized that Oregon law involves this two-step process. *Forsyth* v. *Cessna Aircraft Company,* 520 F.2d 608, 611-12 (9th Cir. 1975).

courts and defendants from stale claims. *Tomlin* v. *Boeing*, 650 F.2d 1065, 1070-71 (9th Cir. 1981).

There are no Washington interests or policies involved. The underlying cause of action is not based on state law but on a federal statute. Washington has no interest in barring Fletcher's claims. The Oregon Supreme Court in *Erwin* held:

> "Washington policy cannot be offended if the court of another state affords rights to a Washington woman which Washington does not afford, so long as a Washington defendant is not required to respond. The state of Washington appears to have no material or urgent policy or interest which would be offended by applying Oregon law." 506 P.2d at 496.

The only result of applying the Washington statute of limitations to *Fletcher* is to limit the liability of a Pennsylvania wrongdoer. This is not a case of forum shopping by a nonresident plaintiff whose cause of action has no connection to the forum. Fletcher was overcharged for *millions* of gallons of gasoline purchased in Oregon. The Oregon district court already had before it two similar cases filed by Dyke and Colvin arising out of the same basic fact situation. Gulf made one decision to overcharge all three plaintiffs alike, in both Oregon and Washington. It is logical that the same limitation period — that of the forum — be applied to all overcharges.

In deciding an issue not raised on appeal, the appeals court misread the record, disregarded the de-

ference to be accorded a district court judge in interpreting questions of local law,[9] and analyzed Oregon choice of law contrary to the decisions of the highest court of the State of Oregon and contrary to the Ninth Circuit which has interpreted Oregon law in conformity with the Oregon Supreme Court.

CONCLUSION

The Temporary Emergency Court of Appeals has seriously misconstrued two provisions of the Emergency Petroleum Allocation Act of 1973. Although the Act has now expired, the court's holdings improperly denying attorney's fees and standing will, unless corrected, be applied by all of the district courts in the many private enforcement actions under the Act which remain pending throughout the country. Each of those misconstructions of the Act means that in this and other cases the Act will not be properly applied to carry out its remedial purpose. The appeals court's errors should be promptly corrected.

The court's third error, failure to follow the Oregon Supreme Court's decisions, should also be corrected. When it undertook to reexamine the district court's analysis of Oregon law, a point not raised on appeal, the federal appeals court omitted the crucial first step in that analysis as adopted and applied by Oregon's

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[9] *Takahashi* v. *Loomis Armored Car Service*, 625 F.2d 314, 316 (9th Cir. 1980).

highest court. As a consequence, it applied another state's statute of limitations under circumstances where the Oregon courts would not have done so.

Respectfully submitted,

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